

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FREDERICK M DETWILER,

Plaintiff,

v.

PIERCE COUNTY, JUDY SNOW, PAT
CARNY,

Defendants.

CASE NO. C14-5251 BHS-JRC

ORDER ON PENDING MOTIONS

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

There are a number of pending motions in this action. The Court can address some of these motions by order and some must be addressed in a Report and Recommendation.

The first motion is plaintiff's motion to have the Court serve subpoenas (Dkt. 25). Plaintiff obtained signed subpoenas from the Court. One of these subpoenas is directed to defendants and tells them to provide documents (Dkt. 25-1) The other subpoena is directed to Dr. Stanley Fleming and directs him to provide medical records (Dkt. 25-2). Plaintiff's pro se

status pays the filing fee, which an inmate repays over time, and the cost of initial service of process. Plaintiff must still pay other costs of litigation. The Court does not serve subpoenas. Plaintiff can send a subpoena duces tecum to counsel in connection with depositions. *See* Fed. R. Civ. P. 30(b)(2). Plaintiff may make a discovery request pursuant to Fed. R. Civ. P. 34. If plaintiff wishes to enforce a subpoena served pursuant to Fed. R. Civ. P. 45, he must provide the Court with proof that he has complied with the rule. The Court denies plaintiff's motion asking the Court to serve his subpoenas (Dkt. 25).

Plaintiff's next asks the Court to allow him to file an amended complaint (Dkt. 28). Plaintiff makes his request in response to a motion to dismiss filed by defendants (Dkt. 21). However, plaintiff has already filed one amended complaint (Dkt. 7).

Fed. R. Civ. P. 15(a) addresses amendment of the complaint before trial and states:

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(2) applies to this case because plaintiff has already amended his complaint once (Dkt. 7). There are policy reasons for liberally granting motions to amend when justice so requires. *Sweaney v. Ada County*, 119 F.3d 1385, 1392 (9th Cir, 1997). The factors considered include undue delay, bad faith, prejudice to the opponent, and futility. *Id.* *See also*

1 *Foman v. Davis*, 371 U.S. 178, 182 (1962). A party wishing to amend a pleading in this court
2 must comply with Local Civil Rule 15. Local Civil Rule 15 states:

3 A party who moves for leave to amend a pleading, or who seeks to amend a
4 pleading by stipulation and order, must attach a copy of the proposed amended
5 pleading as an exhibit to the motion or stipulation. The party must indicate on the
6 proposed amended pleading how it differs from the pleading that it amends by
7 bracketing or striking through the text to be deleted and underlining or
8 highlighting the text to be added. The proposed amended pleading must not
incorporate by reference any part of the preceding pleading, including exhibits. If
a motion or stipulation for leave to amend is granted, the party whose pleading
was amended must file and serve the amended pleading on all parties within
fourteen (14) days of the filing of the order granting leave to amend, unless the
court orders otherwise.

9 *See* Local Civil Rule 15. Plaintiff has not provided the Court with a proposed amended
10 complaint. The Court is not in a position to rule properly on plaintiff's request because the Court
11 cannot know if the proposed amendment cures any defect or is futile. Accordingly, the Court
12 denies plaintiff's motion to file an amended complaint (Dkt. 27), without prejudice. Plaintiff
13 may renew his motion and provide a proposed complaint. If plaintiff files a motion to amend
14 with a proposed amended complaint he needs to know that the proposed complaint would be a
15 complete substitute for the original amended complaint and not a supplement.

16 Plaintiff's third motion is a one paragraph request to "dismiss all pending charges." (Dkt.
17 28). The Court would consider this filing as a notice of dismissal pursuant to Fed. R. Civ. P. 41,
18 however, plaintiff has subsequently continued to pursue this action by filing a motion to compel
19 discovery and a motion to "contest summary judgment and proceed to trial." (Dkt. 32 and 34). If
20 plaintiff wishes to dismiss this action he may file a notice of dismissal. *See* Fed. R. Civ. P. 41.
21 There are no pending charges in this case because the action is a civil action and not a criminal
22 prosecution. This motion is dispositive and must be addressed in a separate Report and
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1 Recommendation unless plaintiff withdraws the motion. The Court will address this motion on
2 October 17, 2014, if plaintiff does not withdraw the motion.

3 The next motion is defendants' request for additional time to file a reply regarding the
4 currently pending motion to dismiss (Dkt. 29). Defendants filed their reply on August 15, 2014,
5 (Dkt. 33). The Court will consider that filing and denies defendants' motion for additional time
6 as moot.

7 Plaintiff filed a motion to compel discovery asking the Court to order Conmed medical
8 record staff to produce "documents, records, or electronically stored information" critical to his
9 case (Dkt. 32). Conmed is not a party to this action. The Court requires information and a
10 response from defendants regarding this motion. Plaintiff does not have a right to free copies;
11 however, he does have a right to view his own medical files and have copies of documents made
12 if he can afford them. Defendants' response should address if there are medical records at the
13 facility regarding plaintiff's health or treatment, how those records are stored, and if plaintiff has
14 the opportunity to view his own medical records and make copies if he can afford them.
15 Defendants' response to this motion will be due on or before September 26, 2014. Plaintiff's
16 reply will be due on or before October 10, 2014. The Court re-notes (Dkt. 32), for October 10,
17 2014.

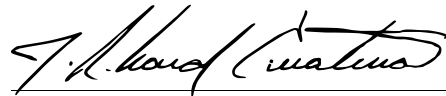
18 Plaintiff's final motion is a "motion in opposition to summary judgment" with eighty
19 eight pages of declarations and exhibits (Dkt. 34 and 35). There is not a motion for summary
20 judgment pending before the Court. Defendants filed a motion to dismiss (Dkt. 21). A motion to
21 dismiss tests the sufficiency of a complaint. *Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.*,
22 583 F. 2d 426, 429 (9th Cir. 1978). Matters outside the complaint are not considered unless they
23 are something that the Court can consider by judicial notice. Fed. R. Civ. P. 12 (d) states that if
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1 matters outside the pleadings are submitted and not excluded by the Court the motion to dismiss
2 must be treated as a motion for summary judgment. *See* Fed. R. Civ. P. 12(d). The Court is not
3 inclined to convert defendants' motion to dismiss to a motion for summary judgment. The Court
4 will not consider (Dkt. 34 or 35).

5 This leaves the Court with defendants' motion to dismiss. The Court wishes to address
6 plaintiff's motion to compel and plaintiff's motion to dismiss prior to considering defendants'
7 motion to dismiss. Therefore, the Court re-notes defendants' motion to dismiss (Dkt. 21) for
8 October 17, 2014.

9 The Clerk's Office is instructed to remove Dkt. 25, 27, 29, and 34, from the Court's
10 calendar. Re-note Dkt. 32, for consideration on October 10, 2014 and re-note Dkt. 28 and 21 for
11 October 17, 2014.

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13 Dated this 10th day of September, 2014.

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16 J. Richard Creatura
17 United States Magistrate Judge
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